Louisiana Law Review

Volume 19 | Number 4
June 1959

Appellate Review on the Facts in a Criminal Case

Joseph G. Hebert

complete service at a lower cost. It has been noted that such a "package service" would be especially valuable to the small businessman who may not be able to engage an attorney and a CPA separately.[58] However, considering the conflict of duties problem, it must be recommended that joint practice be limited only by prohibiting the joint practitioner's certifying financial statements and acting as an attorney for the same client. On the other hand, the reasons which have been advanced in support of prohibiting any type of joint practice do not seem to apply to situations where the attorney-CPA, in addition to acting in the capacity of an attorney, counsels his client in accounting problems not requiring certification.

The stringent prohibitions expressed in this proposed Code would undoubtedly have the effect of deterring capable individuals from attempting to achieve professional proficiency in both accountancy and law. To discourage such attempts would be obviously detrimental to both professions, and more important, to the public, for although unlimited concurrent practice of law and accounting may be inadvisable, the individual practitioner will inevitably apply, to the public good, his knowledge of one discipline in his practice of the other.

Rather than follow the negative and prohibitory approach of the proposed Code, it would seem better to encourage the development of greater individual proficiency in both professions to the end that the public may receive the benefit of more efficient and complete counsel in those areas of the law involving virtually inseparable questions of law and accounting. To achieve this end, Canon 27 of the ABA's Canons of Professional Ethics and the related rules of the various state bar associations should be amended to permit the attorney-CPA to designate himself as "attorney-certified public accountant" and to state openly his dual professional qualifications on cards, letterheads, shingles, doors, building directories, and announcements.

Charles B. Sklar

Appellate Review on the Facts in a Criminal Case

HOW MUCH EVIDENCE IS "SOME" EVIDENCE

Article VII, Section 10, of the Louisiana Constitution provides that the Supreme Court's appellate jurisdiction in criminal

58. Comment, 3 U.C.L.A.L. REV. 360, 369 (1956).

cases shall extend "to questions of law alone."[1] It is implicit in this provision that the court shall have no power to review facts in criminal cases.[2] It is inevitable, however, that questions of law do not arise in a vacuum void of facts.[3] To interpret the constitutional provision as restricting the court's power of review to questions of "pure law"[4] would emasculate the utility of appellate review. Recognizing this, the Louisiana Supreme Court has interpreted the constitutional provision so as to allow, in effect, a review or "examination"[5] of the facts in a criminal case in certain limited instances. Thus although questions of fact passed on by the jury are generally beyond review,[6] where the trial judge himself passes on mixed questions of law and fact[7] or on

1. LA. CONST. art. VII, § 10.

2. See State v. Di Vincenti, 232 La. 13, 93 So.2d 676 (1957); State v. Gaspard, 222 La. 222, 62 So.2d 281 (1952); State v. Haddad, 221 La. 337, 59 So.2d 411 (1952); State v. Smith, 153 La. 245, 95 So. 705 (1923); State v. Green, 111 La. 89, 35 So. 396 (1903).

3. See State v. Charlot, 8 Rob. 529, 530 (La. 1844): "Questions of law are so frequently dependent upon the testimony, and so mingled with the facts, that it would, in many instances, be difficult to disconnect them. What would be a correct exercise of the legal discretion of the court, upon *one* set of facts, would, on a different hypothesis, where the mass of testimony was of a contrary and different complexion, constitute such a perversion of its legal discretion, as imperiously to require the intervention of this court."

4. There is some authority to the effect that the curious wording of the Constitution using the word "alone" restricts the jurisdiction of the Supreme Court to questions of pure law. See the dissent of Justice Fenner in State v. Seiley, 41 La. Ann. 143, 153 (1889): "Prior to the Constitution of 1845, there was no constitutional provision regulating appeals in criminal cases. Under the legislative provisions on that subject, the court of criminal appeals had assumed jurisdiction to pass on questions of fact when blended with questions of law. To put an end to this practice, the Constitution of 1845 expressly and emphatically restricted the appellate jurisdiction to 'questions of law *alone*.'" *But cf.* State v. Nelson, 32 La. Ann. 842, 844 (1880): "It unquestionably was the object of the framers of the different constitutions of this State, which limit the jurisdiction of the Supreme Court in the criminal cases specified to questions of law *alone*, that such court should not have the power of reviewing the facts proved on the trial of the case and passed upon by the jury . . . in other words, of *reviewing the verdict of the jury*."

5. See State v. Thomas, 224 La. 431, 69 So.2d 738 (1954) (examine); State v. D'Ingianni, 217 La. 945, 47 So.2d 731 (1950) (investigate); State v. Drew, 202 La. 8, 11 So.2d 12 (1942) (examine).

6. State v. Hilliard, 227 La. 208, 78 So.2d 835 (1955); State v. Green, 111 La. 89, 35 So. 396 (1903).

7. See State v. Domino, 234 La. 950, 102 So.2d 227 (1958) (admissibility of confessions); State v. Baum, 230 La. 247, 88 So.2d 209 (1956) (competency of experts); State v. Magee, 215 La. 675, 41 So.2d 499 (1949) (commission of overt act by deceased); State v. Brodes, 156 La. 428, 100 So. 610 (1924) (present insanity). See also State v. Ashworth, 43 La. Ann. 204, 8 So. 625 (1891); State v. Seiley, 41 La. Ann. 143 (1889); State v. Nelson, 32 La. Ann. 842 (1880). For a discussion of the so-called "mixed questions of law and fact," see State v. Hayes, 162 La. 917, 111 So. 327 (1927).

questions of fact which do not directly pertain to the guilt or innocence of the accused,[8] such facts are reviewable.[9]

If there is *some* evidence in support of a finding of fact relating to the guilt or innocence of the accused the Supreme Court has said it cannot review.[10] However, this rule is qualified in that regardless of whether the initial finding was made by the trial judge or by a jury,[11] if there was no evidence *at all* to support an essential element of the crime charged, the Supreme Court not only *can*[12] review but *must*[13] review the facts. The rationale employed here is that, if there is no evidence at all relative to an essential element of the crime charged, the question

8. See State v. Smith, 145 La. 913, 916, 83 So. 189, 190 (1919): "The argument [that this question is one of fact beyond the jurisdiction of this court] rests upon the provision, in article 118 of the Constitution, that appeals from the juvenile court shall be allowed upon matters of law only. That means merely that, as in all criminal cases, we shall not have jurisdiction of a question of fact pertaining to the question of guilt or innocence, or to the merits of the case. It does not apply to a question of fact, upon which the trial judge has based a ruling, not pertaining to the question of guilt or innocence, or to the merits of the case."

Examples of issues which do not pertain to the guilt or innocence of the accused are prescription, State v. Guillot, 200 La. 935, 9 So.2d 235 (1942), and venue, State v. Paternostro, 224 La. 87, 68 So.2d 767 (1953).

9. The rule is stated that, although review in these matters is possible, it will not be exercised adversely to the trial judge's ruling unless he is clearly wrong. See, *e.g.*, State v. Hilliard, 227 La. 208, 78 So.2d 835 (1955).

Even though the question presented is initially one for the judge, if he passes the question to the jury, their finding is conclusive. State v. Paternostro, 224 La. 87, 68 So.2d 767 (1953) (venue). *Cf.* State v. Guillot, 200 La. 935, 9 So.2d 235 (1942) (prescription).

10. See State v. Di Vincenti, 232 La. 13, 93 So.2d 676 (1957).

11. State v. Wilson, 196 La. 156, 198 So. 889 (1940).

12. State v. Amiss, 230 La. 1003, 89 So.2d 877 (1956) (court can only "examine" to see if there is any evidence); State v. Fitzgerald, 226 La. 801, 77 So.2d 400 (1954) (rule termed law well settled). An application of the rule resulted in an annulment of the conviction in the following cases: State v. Daniels, 109 So.2d 896 (La. 1959) (intimidation of public officer not intended); State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958) (no evidence that victim was unmarried); State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957) (no knowledge of graft system); Mayerhafer v. Department of Police, 235 La. 437, 104 So.2d 163 (1958) (same); State v. Harrell, 232 La. 35, 93 So.2d 684 (1957) (no evidence of criminal negligence); *In re* Glassberg, 230 La. 396, 88 So.2d 107 (1956) (accidental discharge of gun); State v. La Nasa, 229 La. 842, 87 So.2d 1 (1956) (blue black ink not shown not to be black ink, reversed on other grounds also); State v. Brown, 224 La. 480, 70 So.2d 96 (1954) (gambling not shown to be business); State v. McLean, 216 La. 670, 44 So.2d 698 (1950) (worthless check not given for something of value); State v. Wooderson, 213 La. 40, 34 So.2d 369 (1948) (no performance of a lewd act); State v. Nomey, 204 La. 667, 16 So.2d 226 (1943) (no intent to sell liquor); State v. Laborde, 202 La. 59, 11 So.2d 404 (1942) (no asportation); State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941) (trial judge presumed intent to sell liquor); State v. Wilson, 196 La. 156, 198 So. 889 (1940); State v. Morgan, 157 La. 962, 103 So. 278 (1925) (no corpus delicti); State v. Gani, 157 La. 231, 102 So. 318 (1924) (conviction as second offender); State v. Giangosso, 157 La. 360, 102 So. 429 (1924) (stolen things belonged to defendant); and State v. Dunnington, 157 La. 369, 102 So. 478 (1924) (resisting an officer).

13. State v. McLean, 216 La. 670, 44 So.2d 698 (1950); State v. Wooderson, 213 La. 40, 34 So.2d 369 (1948); State v. Nomey, 204 La. 667, 16 So.2d 226 (1943); State v. Wilson, 196 La. 156, 198 So. 889 (1940).

presented to the court on appeal becomes one of law within its jurisdiction[14] — "whether it be lawful to convict an accused without any proof whatsoever as to his guilt."[15] This is as far as the Supreme Court has gone in its statement of rules interpreting the constitutional provision, for it has consistently held that the sufficiency of the evidence or its credibility cannot be considered on appeal.[16] Neither can the court review the facts to ascertain whether the defendant was afforded the protection of the reasonable doubt rule[17] nor to see if an inference of innocence is just as reasonable from the evidence as an inference of guilt.[18]

The origin of the Louisiana "no evidence" rule, as it will hereinafter be called, is not clear.[19] In 1920[20] the no evidence rule was stated by the court as presenting a reviewable issue of law, but was found inapplicable in the case inasmuch as some evidence had been produced. In *State v. Giangosso*[21] in 1924 the facts as certified by the trial judge showed that the defendant, convicted of receiving stolen things, really owned the things. An application of the no evidence rule in that case resulted in a remand. From the apparent inception of the rule until the present there has been no judicial expression indicating that the principle as stated is contrary to the constitutional provision. But the determination of whether there is some evidence or none has caused vigorous disagreement among the Justices.[22] An examination of

14. State v. Di Vincenti, 232 La. 13, 93 So.2d 676 (1957); State v. Montgomery, 170 La. 203, 127 So. 601 (1930); State v. Wells, 147 La. 822, 86 So. 268 (1920).

15. State v. Nomey, 204 La. 667, 670, 16 So.2d 226, 227 (1943). See Justice O'Niell's dissent in State v. McDonell, 208 La. 602, 23 So.2d 230 (1945). The court was here divided not in relation to the statement of the rule, but rather as to its application to the facts of the case.

16. See State v. Roberts, 224 La. 491, 70 So.2d 100 (1953); State v. Matassa, 222 La. 363, 62 So.2d 609 (1952); State v. Haddad, 221 La. 337, 59 So.2d 411 (1951); State v. Sawyer, 220 La. 932, 57 So.2d 899 (1952); State v. Shelby, 215 La. 637, 41 So.2d 458 (1949); State v. Vallery, 214 La. 495, 38 So.2d 148 (1948); State v. Cortez, 211 La. 669, 30 So.2d 681 (1947); State v. McDonell, 208 La. 602, 23 So.2d 230 (1945).

17. State v. Vallery, 214 La. 495, 38 So.2d 148 (1948); State v. Mattio, 212 La. 284, 31 So.2d 801 (1947); State v. Bell, 188 La. 322, 177 So. 63 (1937).

18. State v. Roberts, 224 La. 491, 70 So.2d 100 (1953); State v. Gaspard, 222 La. 222, 62 So.2d 281 (1952) (by implication in the case).

19. It was first urged in the case of State v. Diskin, 35 La. Ann. 46 (1883), but the court avoided ruling on the possibility of review if the facts conformed to the rule by stating that counsel was really urging an objection to the sufficiency of the evidence.

20. State v. Wells, 147 La. 822, 86 So. 268 (1920).

21. 157 La. 360, 102 So. 429 (1924).

22. See the dissents saying there was *no* evidence in State v. Cortez, 211 La. 669, 30 So.2d 681 (1947) (point at issue was fact of possession) and State v. McDonell, 208 La. 602, 23 So.2d 230 (1945) (time of breaking and entering at issue). The case of State v. Gremillion, 160 La. 121, 106 So. 716 (1925) produced

those cases where an application of the rule resulted in a reversal may provide guidance for future cases.

Affirmative Showing of Impossibility

These cases fall into several general classes and the first class, which encompasses the earlier cases, raises the question as to whether the rule was correctly stated in its inception. Here the court seems to have been impressed not so much with the idea that there was no evidence relative to an essential element of the crime charged, but rather that the evidence clearly showed a state of facts completely inconsistent with that state of facts necessary to prove the element in question.[23] Examples are where it was shown in a conviction for receiving stolen things that the things really belonged to the accused;[24] where it was shown that the defendant participated in a dice game merely as a player and did not conduct the game as a business;[25] and where the defendant's action did not constitute the performance of a lewd act in the crime of obscenity as charged.[26] Other cases in this line were where it was shown that the defendant, charged with being a second offender, had not been finally convicted for the first offense;[27] where the record showed that the accused had cooperated fully with the arresting officer although he had been convicted of resisting arrest;[28] and where the accidental discharge of a gun precluded the general intent necessary for aggravated battery.[29] These cases reiterated the rule applied in no evidence terminology rather than saying that there was an affirmative showing of a state of facts inconsistent with the facts necessary to a valid conviction. Phrasing the rule under the latter con-

vigorous dissents, but the true point at issue apparently involved a problem of statutory interpretation.

The more recent cases have consistently contained dissents urging the existence of *some* evidence. See State v. Daniels, 109 So.2d 896 (La. 1959); State v. La Borde, 234 La. 28, 99 So.2d 11 (1958); Mayerhafer v. Department of Police, 235 La. 437, 104 So.2d 163 (1958); State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957); State v. Harrell, 232 La. 35, 93 So.2d 684 (1957).

23. The rationale of State v. Wilson, 196 La. 156, 198 So. 889 (1940) is especially pertinent here since there the court said that the evidence tended to prove affirmatively that the charged crime was not committed, but that it was sufficient to say that there was no evidence relative to an essential element. The crime charged was not specified in the opinion.

24. State v. Giangosso, 157 La. 360, 102 So. 429 (1924).

25. State v. Brown, 224 La. 480, 70 So.2d 96 (1954).

26. State v. Wooderson, 213 La. 40, 34 So.2d 369 (1948).

27. State v. Gani, 157 La. 231, 102 So. 318 (1924).

28. State v. Dunnington, 157 La. 369, 102 So. 478 (1924).

29. *In re* Glassberg, 230 La. 396, 88 So.2d 707 (1956) (delinquency proceeding).

struction certainly would not cover several of the recent cases in this area, but it is submitted that such a statement would be more consistent with the principle which apparently motivated the court in the earlier cases. Deviations from the rule stated as suggested above have produced vigorous dissents urging a reversal of the conviction.[30]

A second class of cases applying the rule of no evidence seems actually to involve problems of statutory interpretation wherein the trial court erroneously failed to interpret the charged crime as requiring an element which the evidence affirmatively showed did not exist. In such cases, then, the district attorney was seeking a conviction for conduct not proscribed by the crime charged, as where asportation was found on appeal to be a necessary element in the crime of cattle stealing;[31] where there had to be an exchange for something of value and not merely a pre-existing debt in a case involving the issuance of a worthless check;[32] and where the court found that blue-black ink sufficiently met the statutory requirement of using black ink in a death certificate.[33] It should be noted that this class of cases, unlike the first class, still leaves the matter of determining reviewability in advance much to the conjecture of counsel, inasmuch as it is dependent upon the interpretation which the Supreme Court will place on the crime charged.

Failure of Proof

A third set of cases in this area involve prosecutions where an element of the crime cannot be proved by direct evidence, but can only be adduced by inference from the circumstances. In *State v. Sbisa*[34] the court reversed a conviction for misfeasance in office upon a finding that the officer had no knowledge of the

30. State v. Cortez, 211 La. 669, 30 So.2d 681 (1947). In a conviction for possession of narcotics, the dissent urged that the evidence showed that the defendant had no possession. In State v. McDonell, 208 La. 602, 23 So.2d 230 (1945), the accused was convicted of breaking and entering in the night time. Although the prosecution's witness said the crime occurred after dark, she consistently set the time as being between six and seven in the evening. A letter from the local meteorologist stated that sunset had occurred on the day of the crime at 8:04 in the evening. Here again the dissent urged that there was no evidence that the crime had occurred in the night time. State v. Gremillion, 160 La. 121, 106 So. 716 (1925) may fall into this set of cases also, although there the problem causing the split of the court seemed to be more one of statutory interpretation.

31. State v. Laborde, 202 La. 59, 11 So.2d 404 (1942).

32. State v. McLean, 216 La. 670, 44 So.2d 698 (1950).

33 State v. La Nasa, 229 La. 842, 87 So.2d 1 (1956), reversed on other grounds also.

34. 232 La. 961, 95 So.2d 619 (1957).

operation of a graft system which the evidence conclusively showed existed in his precinct. *Sbisa* was followed by the case of *Mayerhafer v. Department of Police*,[35] which employed the same rationale. Reversing a conviction of negligent homicide where the accused speeded up his car to get by when he detected the deceased pedestrian about to cross the road, the court in *State v. Harrell*[36] said that the defendant's action may have been "a poor choice of action" or "an error of judgment" but it did not constitute criminal negligence. On first hearing in the case of *State v. Daniels*[37] the court reversed a conviction of public intimidation where the evidence showed that the accused, a convict in the state penitentiary, swung at and hit a guard of that institution. It was held that there was no evidence showing that the defendant by his action intended to influence the conduct of the guard. In all these cases dissents were registered urging that the issue was one of fact on which some evidence was apparent. It does appear that in these cases there was "some" evidence on the issue, and the rulings of the court appears to approach, if not reach, the point of ruling on the sufficiency of the evidence.

Apparently there are only three cases in which the court was squarely presented with a problem of no evidence relative to an essential element. Two cases involved convictions for possessing liquor with the intent to sell it.[38] Both seem to present a situation where the trial court worked from an approach of assuming the intent to sell from the mere fact of possession. In one of these cases, the trial judge expressly admitted that he had "presumed" this factor.[39] In the third case[40] the district attorney admitted that there was no evidence tending to show the crime except the confession of the accused. Holding that the corpus delicti could not be established by a confession alone, the court said that by the district attorney's admission there was no other evidence on this essential element, and remanded the case.

The recent case of *State v. La Borde*[41] is most difficult of classification even under the very general designation established

35. 235 La. 437, 104 So.2d 163 (1958).
36. 232 La. 35, 93 So.2d 684 (1957).
37. 109 So.2d 896 (La. 1959).
38. State v. Nomey, 204 La. 667, 16 So.2d 226 (1943) termed a borderline case in State v. Daniels, 109 So.2d 896 (La. 1959) (dissent) and State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941).
39. In State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941), explained in State v. Valentine, 203 La. 1057, 14 So.2d 851 (1943).
40. State v. Morgan, 157 La. 962, 103 So. 278 (1925).
41. 234 La. 28, 99 So.2d 11 (1958).

above and thus it may indicate a new consideration in the no evidence rule. In this case the court reversed on the grounds that there was no evidence that the victim of the carnal knowledge was unmarried at the time of the crime. The evidence did show that the girl, only fourteen years old, was in school, living with her parents, and had received several offers of marriage from the defendant in the interim between the commission of the crime and the filing of the indictment. A dissent was raised on the grounds that only a question of fact was at issue upon which some evidence had been adduced. It appears that the majority was moved by the relative ease with which the state could have proved the fact at issue, and felt that it should not be entitled to rely on circumstantial evidence when one question placed to the girl while she was on the stand would have afforded direct evidence of the best sort. The writer of the majority opinion in *La Borde* has subsequently indicated that this was the line of reasoning applied there.[42]

From the above cases certain generalizations may be deduced which perhaps will assist counsel attempting to present a problem under the no evidence rule to the Supreme Court. It should be clear that where the evidence affirmatively shows that an essential element of the charged crime could not have occurred, then the accused is entitled to a reversal.[43] Where, however, the statute is vague or unclear and general in its specification of the crime, this affirmative proof of impossibility may have to await elucidation as to the required elements by the Supreme Court before the proof and the element can be compared.[44] Where, as in most of the cases in the third class discussed above,[45] the element at issue is a subjective matter of intent or knowledge,[46] the court appears prone to find that slight evidence is no evidence.

42. Justice McCaleb, dissenting in State v. Daniels, 109 So.2d 896 (La. 1959) (on first hearing).

43. See cases cited at notes 22-28 *supra*. The same result should follow where the judge presumes an element, State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941), or the district attorney admits he has no legally acceptable evidence, State v. Morgan, 157 La. 962, 103 So. 278 (1925).

44. See cases cited at notes 30-32 *supra*.

45. See the cases cited at notes 33, 34, 36 *supra*.

46. Compare with the cases cited notes 34, 35, 37 *supra* the case of State v. Almerico, 232 La. 847, 95 So.2d 334 (1957) and State v. Sawyer, 220 La. 932, 57 So.2d 899 (1952) relative to the inference to be drawn from the circumstances.

It is to be noted that the cases cited notes 33, 34, and 36 *supra* all involve problems of intent where as the *Almerico* and *Sawyer* cases *supra* involved issues other than intent. Query: will the court require a "probabilities" test in matters of intent, while accepting a "possibility" test on other elements of the crime charged?

The reason for this may be due to the court's general abhorrence[47] of presuming an intent from the mere facts of a situation in the absence of a clear inference from those facts that this was what the defendant intended or knew. Where the point at issue is capable of direct proof, *La Borde*[48] indicates that nothing less will do regardless of the inferential weight of the circumstances.

Some cases in articulating the no evidence rule have used the words "legal"[49] or "probative"[50] evidence. It would seem that if the only evidence in support of an essential element were legally inadmissible evidence, the exclusion of that evidence on appeal would make the no evidence rule applicable.[51] Thus the rule might well be stated "no legal evidence on an essential element will afford grounds for reversal." However, if the word "probative" is added, that seems clearly to relate to sufficiency and would cause the rule to be stated in terms offensive to the constitutional provision.[52] It must be noted, however, that the recent cases tend to move to this interpretation, in effect.[53]

Perfecting the Motion

Granted defendant has a valid case of no evidence, it is still necessary for him to perfect his appeal on it.[54] The proper method for raising the objection is on motion for new trial.[55] If

47. On this matter of presumptions, see State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941).

48. State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958).

49. See State v. Roberts, 224 La. 491, 70 So.2d 100 (1954) and State v. Davis, 208 La. 954, 23 So.2d 801 (1945).

50. See Mayerhafer v. Department of Police, 235 La. 437, 104 So.2d 163 (1958) (no probative evidence) and State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958) (no evidence of probative value). Note that Justice McCaleb who objected to the majority's use of the term probative in his dissent in the *Mayerhafer* case *supra* seems to have employed essentially the same terminology in his majority opinion in *LaBorde supra.*

51. State v. Davis, 208 La. 954, 23 So.2d 801 (1945), uses the expression "legally admitted evidence." See State v. Brown, 108 So.2d 233 (La. 1959) (confession as establishing the corpus delicti) and State v. Morgan, 157 La. 962, 103 So. 278 (1925) (same).

52. However, the case of Mayerhafer v. Department of Police, 235 La. 437, 104 So.2d 163 (1958), in which the ruling was predicated on the court's decision in State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957) uses the term "probative" in this manner. See the dissent in *Mayerhafer supra* on this point, but compare the same Justice's language in State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958). All three cases seem to involve a situation where the court did go to the sufficiency of the evidence.

53. See the cases cited note 52 *supra.*

54. Failure to bring up the record and other essentials will naturally preclude the court's consideration of the motion. See State v. Gaspard, 222 La. 222, 62 So.2d 281 (1952).

55. State v. Sawyer, 220 La. 932, 57 So.2d 899 (1952) says that this is the proper method to raise the issue. Such a procedure properly raises the issue as a

the trial judge overrules that motion, there is a question of law presented for the Supreme Court if there is in truth no evidence relative to an essential element. Counsel should be specific and ground his motion for a new trial on the clear allegation that there is no evidence relative to an essential element so that it is clear that his objection is not one going to the sufficiency of the evidence.[56] It has been said that, in support of such a motion, on appeal the entire transcript or record should be brought up.[57] This should be true only where the problem is properly one of no evidence or grossly insufficient evidence[58] (as in those cases in class three and the case of *La Borde*). If the situation is one where the facts affirmatively show that an essential element could not have occurred (as in those cases in classes one and two) then it should suffice if only so much of the trial proceedings are brought up as clearly show this.[59] As a precaution, however, counsel should bring up the entire transcript[60] so that regardless of the exact nature of the no evidence problem, the court will be able to consider it.

---

question of law in compliance with LA. R.S. 15:516 (1950) (jurisdiction of Supreme Court to review trial court's rulings on motions for new trial limited to errors of law). See State v. Reilly, 37 La. Ann. 5 (1885) (counsel must make the question one of law) and State v. Taylor, 37 La. Ann. 40 (1885) (where counsel appears to have raised a no evidence objection improperly). *But cf.* State v. Nomey, 204 La. 667, 16 So.2d 226 (1943) (where writs were employed); State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941) (same).

56. See State v. Vallery, 214 La. 495, 38 So.2d 148 (1948); State v. Calloway, 213 La. 129, 34 So.2d 399 (1948). *But cf.* State v. Saia, 212 La. 868, 33 So.2d 665 (1947). In State v. D'Ingianni, 217 La. 945, 47 So.2d 731 (1950) counsel moved for a new trial on the grounds that the verdict was contrary to the law and evidence; his amended motion still questioned the sufficiency of the evidence, but the court "examined" the evidence from a no evidence standpoint, although it said that because of the procedure employed it did not have to.

It would seem that if counsel, however he phrases his motion, makes it clear that his argument goes to a lack of any evidence rather than the sufficiency of the evidence, the court will consider the issue, and review.

57. See State v. Sawyer, 220 La. 932, 57 So.2d 899 (1952); State v. D'Ingianni, 217 La. 945, 47 So.2d 731 (1950).

58. This was done in State v. Nomey, 204 La. 667, 16 So.2d 226 (1943). Of course if it is admitted by the trial judge or the district attorney that an essential element was not proved, then such admission should be sufficient to predicate a reversal. State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941) (judge "presumed" the essential element); State v. Laborde, 202 La. 59, 11 So.2d 404 (1942). See also State v. Morgan, 157 La. 762, 103 So. 278 (1925) (admission by district attorney). The facts were stipulated in State v. Gremillion, 160 La. 121, 106 So. 716 (1926).

59. See State v. Giangosso, 157 La. 360, 102 So. 429 (1924) (trial judge certified statement of facts in bill). See State v. Bernard, 204 La. 844, 16 So.2d 454 (1943), where the statement of facts was stipulated and held properly reviewable on no evidence grounds.

60. The transcript should be incorporated in a bill of exceptions taken to the trial judge's refusal to grant a new trial. See State v. Brown, 108 So.2d 233 (La. 1959).

Disposition of Case Where No Evidence Is Found

Although defendant's motion is for a new trial, the recent cases seem fully committed to disposing of the case by *discharging* the defendant if it is found that the motion is well taken.[61] This practice has been dissented from,[62] and strongly criticized by two Justices who nevertheless feel bound to follow it.[63] One Justice has suggested that a new plea "a demurrer to the evidence" be employed in these cases so that the pleadings and the dispositions will accord.[64] It is submitted that the determination of whether to discharge or grant a new trial as requested should be determined according to the circumstances: discharging where there is an affirmative showing of impossibility and remanding for a new trial where there is merely a failure of proof.[65] The court's present position also presents the problem of whether in sustaining the defendant's motion for new trial on no evidence grounds the trial judge can discharge the defendant.[66] A more serious problem is whether the discharge granted by the Supreme Court in these cases suffices to make operative the rule of double jeopardy.[67] The seriousness with which this non-responsive disposition of the case has been discussed implies that the judges do not consider it merely a matter of terminology whether the defendant is given a new trial or discharged. If the discharge is to operate as an acquittal, then it is submitted that the no evidence cases must be clearly distinguished to separate

61. See State v. Daniels, 109 So.2d 896 (La. 1959); State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958); State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957); State v. Harrell, 232 La. 35, 93 So.2d 684 (1957).

62. In all the cases cited in note 61 *supra*, there were dissents.

63. Justices McCaleb and Hawthorne. See the decision and dissent in State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958).

64. Justice McCaleb in his dissent in State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957).

65. The older cases are not consistent with this proposition either: State v. Brown, 224 La. 480, 70 So.2d 96 (1954) (affirmative showing — discharge); State v. McLean, 216 La. 670, 44 So.2d 698 (1950) (affirmative showing — new trial); State v. Wooderson, 213 La. 40, 34 So.2d 369 (1948) (affirmative showing — new trial); State v. Nomey, 204 La. 667, 16 So.2d 226 (1943) (failure of proof — discharge); State v. Laborde, 202 La. 59, 11 So.2d 404 (1942) (affirmative showing — discharge); State v. Lassiter, 198 La. 742, 4 So.2d 814 (1941) (failure of proof — discharged); State v. Wilson, 196 La. 156, 198 So. 889 (1940) (affirmative showing — new trial); State v. Morgan, 157 La. 962, 103 So. 278 (1925) (failure of proof — new trial); State v. Giangosso, 157 La. 360, 102 So. 429 (1924) (affirmative showing — new trial); State v. Dunnington, 157 La. 369, 102 So. 478 (1924) (affirmative showing — new trial).

66. This question is posed in State v. LaBorde, 234 La. 28, n. 2, 99 So.2d 11, n. 2 (1958).

67. *Ibid.* Justice McCaleb refers to the paradox that an accused complaining of the overruling of a motion for a new trial may secure a "complete acquittal and discharge" of the crime.

situations of affirmative impossibility from situations involving a mere failure of proof, and a discharge should be granted only in the former situation.

Joseph G. Hebert